

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

LONNIE RAY CARTER,

Plaintiff,

v.

ASHLEY A. ZUBER, *et al.*,

Defendants.

CASE NO. 3:20-cv-05166-RJB-JRC

REPORT AND  
RECOMMENDATION

NOTED FOR: December 18, 2020

This civil rights matter has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. §§ 636 (b)(1)(A) and (B) and Local Magistrate Judge Rules MJR 1, MJR 3, and MJR 4. *See* Am. Gen. Order No. 02-19.

Because plaintiff proceeds *in forma pauperis*, the Court “shall dismiss” plaintiff’s claims “at any time” if the complaint does not state a claim upon which relief can be granted. 28 U.S.C. § 1915(e)(2)(B)(ii). For the reasons stated herein, plaintiff has failed to state a claim upon which relief can be granted except for his claims that defendants allegedly violated his Eighth Amendment rights. Therefore, the undersigned *sua sponte* recommends the dismissal of

1 plaintiff's claims against defendants under the Fifth Amendment and 18 U.S.C. § 242 with  
2 prejudice. The Court further recommends the dismissal of plaintiff's claims against defendants  
3 under the Sixth and Fourteenth Amendments and 42 U.S.C. § 1985(3) without prejudice.

#### 4 **BACKGROUND**

5 Plaintiff, proceeding *pro se* and *in forma pauperis*, initiated this matter in February 2020.  
6 *See* Dkts. 1, 5. In his complaint, filed pursuant to 42 U.S.C. § 1983, plaintiff alleges that  
7 defendants Zuber and Roddey, in their individual capacities, failed to protect him against risk of  
8 serious harm and discriminated against him in violation of plaintiff's Fifth, Sixth, Eighth, and  
9 Fourteenth Amendment rights. *See* Dkt. 6, at 5, 18, 21–22, 31, 33, 43, 55, 58. Plaintiff also  
10 claims that defendants violated 42 U.S.C. § 1985 by allegedly conspiring to place plaintiff in  
11 closed custody at the Washington State Penitentiary ("WSP") despite the allegedly known  
12 danger to plaintiff's safety. *See id.* at 21. Plaintiff seeks compensatory and punitive damages, as  
13 well as a declaratory judgment that defendants violated his constitutional rights. *See id.* at 32,  
14 59.

15 On March 16, 2020, plaintiff filed a motion to supplement the record. *See* Dkt. 7. In his  
16 motion, plaintiff appeared to name additional defendants, raised additional claims, and stated  
17 new facts not alleged in his complaint. *See id.* at 1–2. On April 14, 2020, after reviewing  
18 plaintiff's motion, the Court entered an order to show cause or amend the complaint, allowing  
19 plaintiff additional time to file an amended complaint to add additional defendants and/or factual  
20 allegations or otherwise respond to the order to show cause. *See* Dkt. 8; *see also* Dkts. 11, 15  
21 (granting extensions of time to respond to the order to show cause).

22 On August 20, 2020, plaintiff inquired regarding the state of his complaint and requested  
23 service of the complaint (Dkt. 6) on defendants. *See* Dkt. 17. Additionally, plaintiff appeared to  
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1 respond to the Court’s April 14, 2020, order to show cause (Dkt. 8) by attempting to state new  
 2 claims against two additional defendants (“Community Corrections Officer Ms. D. Nathan” and  
 3 “her supervisor Jane Doe”). *See id.* at 3–7. The Court interpreted plaintiff’s motion (Dkt. 17) as  
 4 a response to the Court’s order to show cause or amend his complaint. *See* Dkt. 18.

5 The Court has carefully reviewed plaintiff’s motion and response to the order to show  
 6 cause (Dkt. 17) and the proposed complaint (Dkt. 6) and declined to serve the complaint as  
 7 written. *See* Dkt. 18. Although the Court found that plaintiff stated cognizable claims that  
 8 defendants allegedly violated plaintiff’s Eighth Amendment rights, the Court found that plaintiff  
 9 failed to state a claim upon which relief can be granted for his remaining claims. *See id.* The  
 10 Court again entered an order to show cause and directed plaintiff to file an amended complaint if  
 11 he wished to attempt to cure the deficiencies in the complaint and proceed on his remaining  
 12 claims or to add additional defendants. *See id.* at 10; *see also* Dkt. 19 (granting an extension of  
 13 time to file an amended complaint).

14 Plaintiff has failed to file an amended complaint or otherwise respond to this most recent  
 15 order to show cause. Therefore, except for plaintiff’s claims that defendants allegedly violated  
 16 his Eighth Amendment rights, the Court recommends the dismissal of plaintiff’s claims under the  
 17 Fifth Amendment and 18 U.S.C. § 242 with prejudice, and the dismissal of plaintiff’s claims  
 18 under the Sixth and Fourteenth Amendments and 42 U.S.C. 1985(3) without prejudice.

## 19 DISCUSSION

### 20 I. Legal Standard

21 A complaint must contain a “short and plain statement of the claim showing that the  
 22 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Mere conclusory statements in a complaint  
 23 and “formulaic recitation[s] of the elements of a cause of action” are not sufficient. *See Chavez*  
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1 v. *United States*, 683 F.3d 1102, 1108-09 (9th Cir. 2012). “Dismissal can be based on the lack of  
 2 a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal  
 3 theory.” *Ballistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). The pleading  
 4 must be more than an “unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft*  
 5 v. *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555  
 6 (2007)).

7 While the Court must accept all the allegations contained in the complaint as true, the  
 8 Court does not have to accept a “legal conclusion couched as a factual allegation.” *Id.* When a  
 9 plaintiff is proceeding *pro se*, his allegations must be viewed under a less stringent standard than  
 10 allegations of plaintiffs represented by counsel. *Haines v. Kerner*, 404 US 519 (1972), *reh’g*  
 11 *denied*, 405 U.S. 948 (1972); *Bretz v. Kelman*, 773 F.2d 1026, 1027 n. 1 (9th Cir. 1985) (en  
 12 banc) (petitioner should be afforded the “benefit of any doubt”).

13 While the court can liberally construe a plaintiff’s complaint, it cannot supply an essential  
 14 fact that a plaintiff has failed to plead. *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992)  
 15 (quoting *Ivey v. Board of Regents of University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982)).

## 16 **II. Analysis**

17 In order to state a claim for relief under 42 U.S.C. § 1983, a plaintiff must show the  
 18 following: (1) he suffered a violation of rights protected by the Constitution or created by federal  
 19 statute, and (2) the violation was proximately caused by a person acting under color of state law.  
 20 See *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). The first step in a § 1983 claim is  
 21 therefore to identify the specific constitutional right allegedly infringed. *Albright v. Oliver*, 510  
 22 U.S. 266, 271 (1994). To satisfy the second prong, a plaintiff must allege facts showing how  
 23 individually named defendants caused, or personally participated in causing, the harm alleged in  
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1 the complaint. *See Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981).

2 Plaintiff first alleges that defendants violated his Fifth Amendment rights. *See* Dkt. 6, at  
3 5, 22, 31, 33, 58. The Fifth Amendment prohibits the federal government from depriving  
4 persons of due process and equal protection under the law. *See Sessions v. Morales-Santana*,  
5 137 S. Ct. 1678, 1686 n. 1 (2017); *Bingue v. Prunchak*, 512 F.3d 1169, 1174 (9th Cir. 2008).  
6 However, defendants appear to be Washington State prison officials, who are not federal  
7 government actors for purposes of the Fifth Amendment, and plaintiff has alleged no facts  
8 indicating any federal government action. *See Bingue*, 512 F.3d at 1174. Accordingly, plaintiff  
9 has failed to state a claim against defendants under the Fifth Amendment, and any attempt to  
10 bring such a claim is likely futile. *See Cato v. U.S.*, 70 F.3d 1103, 1106 (9th Cir. 1995).

11 Therefore, the Court recommends that this claim be dismissed with prejudice.

12 Plaintiff alleges that defendants violated his Sixth Amendment rights. *See* Dkt. 6, at 5,  
13 22, 31, 33, 58. The Sixth Amendment provides that “[i]n all criminal proceedings, the accused  
14 shall enjoy the right to a speedy and public trial . . . ; to be confronted with witnesses against  
15 him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance  
16 of Counsel for his defence.” U.S. Const. amend. VI; *see also Nordstrom v. Ryan*, 762 F.3d 903,  
17 909 (9th Cir. 2014). In his complaint, plaintiff alleges no supporting facts that would implicate  
18 defendants’ violation of plaintiff’s Sixth Amendment rights—rather he merely concludes that  
19 defendants violated those rights. *See Ashcroft*, 556 U.S. at 678 (to state claim on which relief  
20 may be grant, plaintiff must go beyond “labels and conclusions” and must explain how  
21 defendants allegedly violated his rights). Accordingly, plaintiff has failed to state a claim against  
22 defendants under the Sixth Amendment. However, because it is not clear that amendment would  
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1 be futile, plaintiff's claim under the Sixth Amendment should be dismissed without prejudice.

2 Plaintiff alleges that defendants violated his Fourteenth Amendment rights to equal  
3 protection under the law by allegedly discriminating against him based on his race. *See* Dkt. 6,  
4 at 16, 22, 28, 46, 58. In order to state a claim for a violation of the Equal Protection Clause of  
5 the Fourteenth Amendment, plaintiff must show that "defendants acted with an intent or purpose  
6 to discriminate against the plaintiff based upon membership in a protected class." *Furnace v.*  
7 *Sullivan*, 705 F.3d 1021, 1030 (9th Cir. 2013) (internal citations omitted). Additionally, plaintiff  
8 must identify a group of similarly situated individuals who have been treated more favorably, so  
9 that the factor motivating the alleged discrimination can be identified. *See Thornton v. City of St.*  
10 *Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005). Here, plaintiff alleges that defendants treated  
11 plaintiff "differently from other, similarly situated . . . prisoners residing at [WSP]." Dkt. 6, at  
12 16, 22, 28, 46, 58. However, plaintiff fails to allege how defendants treated him any differently,  
13 or less favorably, than the identified group of similarly situated prisoners. Further, plaintiff fails  
14 to allege whether the similarly situated prisoners were in a different protected class than plaintiff.  
15 Accordingly, plaintiff has failed to state a claim under the Fourteenth Amendment. However,  
16 plaintiff may be able to amend the complaint to cure these deficiencies. Therefore, plaintiff's  
17 claim under the Fourteenth Amendment should be dismissed without prejudice.

18 Plaintiff alleges that defendants violated 42 U.S.C. § 1985(3) by allegedly conspiring  
19 with other prison officials to place plaintiff in closed custody at WSP despite the allegedly  
20 known danger to plaintiff's safety. Dkt. 6, at 20–21, 25, 46–48. In order to state a claim under  
21 42 U.S.C. § 1985(3), plaintiff must allege (1) a conspiracy, (2) to deprive any person or a class of  
22 persons of the equal protection of the laws, based on racial or other class-based discriminatory  
23 animus, (3) an act by one of the conspirators in furtherance of the conspiracy, and (4) a personal  
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1 injury, property damage or a deprivation of any right or privilege of a citizen of the United  
2 States. *See Griffin v. Breckenridge*, 403 U.S. 88, 102–103 (1971); *Gillespie v. Civiletti*, 629 F.2d  
3 637, 641 (9th Cir. 1980). Here, plaintiff fails to allege that defendants conspired to place  
4 plaintiff in closed custody based on plaintiff’s race or membership in any other protected class.  
5 Accordingly, plaintiff has failed to state a claim under 42 U.S.C. § 1985(3). However, because it  
6 is not clear that amendment would be futile, plaintiff’s claim under 42 U.S.C. § 1985(3) should  
7 be dismissed without prejudice.

8 Finally, plaintiff appears to allege a violation of 18 U.S.C. § 242, stating generally a  
9 “deprivation [of] civil rights under color of law.” Dkt. 6, at 31, 58. However, 18 U.S.C. § 242 is  
10 a criminal statute that does not give rise to civil liability. *See Allen v. Gold Country Casino*, 464  
11 F.3d 1044, 1048 (9th Cir. 2006) (citing *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980)).  
12 Accordingly, plaintiff is foreclosed from bringing a claim against defendants under 18 U.S.C. §  
13 242, and it is clear that any amendment to such a claim would be futile. *See Cato*, 70 F.3d at  
14 1106. Therefore, plaintiff’s claim under 18 U.S.C. § 242 should be dismissed with prejudice.

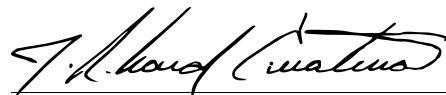
15 In sum, plaintiff has failed to state a claim upon which relief can be granted regarding  
16 defendants’ alleged violations of the Fifth, Sixth, and Fourteenth Amendments, 42 U.S.C. §  
17 1985(3), and 18 U.S.C. § 242. Accordingly, these claims should be dismissed. Plaintiff should  
18 be granted leave to amend his claims against defendants for alleged violations of the Sixth and  
19 Fourteenth Amendments and 42 U.S.C. § 1985(3), as it is not clear that amendment would be  
20 futile. However, plaintiff’s claims against defendants under the Fifth Amendment and 18 U.S.C.  
21 § 242 should be dismissed with prejudice and without leave to amend.

## CONCLUSION

For the reasons set forth above, the Court recommends dismissal of all claims against defendants other than plaintiff's claims that defendants allegedly violated his Eighth Amendment rights. The Court further recommends that plaintiff's claims under the Fifth Amendment and 18 U.S.C. § 242 should be dismissed with prejudice and without leave to amend; however, plaintiff's claims under the Sixth and Fourteenth Amendments and 42 U.S.C. § 1985(3) should be dismissed without prejudice and with leave to amend.

Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of *de novo* review by the district judge, *see* 28 U.S.C. § 636(b)(1)(C), and can result in a waiver of those objections for purposes of appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *Miranda v. Anchondo*, 684 F.3d 844, 848 (9th Cir. 2012) (citations omitted). Accommodating the time limit imposed by Rule 72(b), the Clerk is directed to set the matter for consideration on **December 18, 2020**, as noted in the caption.

Dated this 30th day of November, 2020.



J. Richard Creatura  
United States Magistrate Judge